

**EPA POLICY ON ENVIRONMENTAL JUSTICE FOR
TRIBES AND INDIGENOUS PEOPLES**

(Working Draft – November 14, 2012)

For over twenty years, EPA has been working to effectively implement both a tribal program and an environmental justice program. Together, these programs seek to protect human health and the environment in Indian country, as well as for indigenous peoples throughout the United States. The Agency works with federally recognized tribal governments on a government-to-government basis, as stated in the Agency's 1984 Indian Policy, and other policies, including EPA's Policy on Consultation and Coordination with Indian Tribes. The Agency also understands the need to work with communities and concerned citizens of the United States, including tribal members, to address their environmental and human health concerns. Although the Agency has made significant progress in developing both programs, the EPA recognizes that greater consistency and coordination is needed between our tribal and environmental justice programs. The Agency is working to clarify how the EPA intends to address environmental justice issues in Indian country and for indigenous peoples throughout the United States, in order to ensure consistency in how the Agency implements its environmental justice program with respect to tribes and indigenous stakeholders.

The EPA is working to create its Policy on Environmental Justice for Tribes and Indigenous Peoples. This Working Draft provides the rationale for such a policy and contains draft principles and sub-principles. The Agency will initiate consultation with federally recognized tribes and request comments from indigenous stakeholders and other interested parties on this Working Draft. In addition, EPA requests feedback on the following questions:

- 1. Do the introduction and background sections clearly explain the rationale for creating the Policy on Environmental Justice for Tribes and Indigenous Peoples?*
 - 2. Are the draft principles and sub-principles appropriate for organizing and guiding interactions among EPA, tribes and indigenous stakeholders on EJ issues?*
 - 3. What, if any, changes to the proposed principles and sub-principles should be considered?*
 - 4. What recommendations do you have on how to best implement these principles and sub-principles?*
 - 5. How should we measure progress and success under this policy?*
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INTRODUCTION

The U.S. Environmental Protection Agency (EPA or Agency) *Policy on Environmental Justice for Tribes and Indigenous Peoples* (Policy) establishes seven core principles to integrate environmental justice into the Agency's work with federally recognized tribal governments (tribes)¹ and indigenous stakeholders.² These principles help ensure that all who live in the United States, including in Indian country,³ are protected from significant risks to human health and the environment through the administration of EPA's programs, policies and activities, by implementing federal environmental laws fairly and effectively, and by using the best available science.

The United States has a unique legal relationship with tribal governments based on the Constitution, treaties, statutes, executive orders, and court decisions. The EPA believes that in addition to working with tribes on a government-to-government basis the Agency needs to expand its efforts to include other indigenous stakeholders, such as working with indigenous community-based/grassroots organizations and tribal colleges to improve environmental health throughout the United States and its territories. The EPA believes the principles in this Policy provide a framework for how the Agency is to work with tribes and indigenous stakeholders to enhance environmental and human health protection in Indian country, and for indigenous communities throughout the United States, including in Hawaii and the U.S. Insular Areas, such as American Samoa, the Northern Marianas Islands, and Guam. To effectively implement the Policy, the Agency intends to develop an implementation plan based on these principles.

This Policy is designed to supplement the implementation and integration of Executive Order 12898,⁴ Plan EJ 2014,⁵ the *EPA Policy for the Administration of Environmental Programs on Indian Reservations* (EPA Indian Policy),⁶ and the *EPA Policy on Consultation and Coordination with Indian Tribes* (EPA Consultation Policy).⁷ When implementing this Policy, EPA will continue to coordinate and collaborate with tribes as the primary parties for protecting the environment and public health in their areas through the use of their own tribal environmental and human health codes and/or authorized federal environmental programs, to effectively provide for environmental justice in Indian country.

BACKGROUND

The EPA previously issued general statements of policy that recognize the importance of protecting public health and the environment in Indian country, as well as in minority, low-income, and indigenous communities. The 1984 EPA Indian Policy is the foundation for coordination and collaboration with federally recognized tribes to protect the environment and human health in Indian country. The EPA works with federally recognized tribes as sovereigns, partners, and co-regulators, with jurisdiction over their own lands and concerns. In addition, the United States supports the United Nations Declaration on the Rights of Indigenous Peoples,⁸ and EPA recognizes the importance of incorporating the Declaration's principles into the Agency's effort to provide for environmental justice, as appropriate.

Executive Order 12898 directs each federal agency, as defined in the Order, to "make achieving environmental justice part of its mission by identifying and addressing, as appropriate,

disproportionately high and adverse human health or environmental effects of its programs, policies, and activities on minority populations and low-income populations in the United States.” The Executive Order applies equally to Native American programs of each federal agency.⁹ The EPA defines environmental justice as:

*the fair treatment and meaningful involvement of all people regardless of race, color, national origin, or income with respect to the development, implementation, and enforcement of environmental laws, regulations, and policies.*¹⁰

An important goal of the EPA is to ensure environmental justice for all communities, peoples, and persons across the United States. The EPA identifies potential areas of environmental justice concern by conducting analyses, using environmental, public health, demographic and other data, as well as through concerns raised by tribes and indigenous stakeholders.

Expanding the conversation on environmentalism and working to achieve environmental justice are priorities for the EPA. In September 2011, the EPA released Plan EJ 2014,¹¹ which is the Agency’s overarching strategy for advancing environmental justice that was inspired by the upcoming 20th anniversary of the signing of Executive Order 12898. The Plan seeks to: 1) protect health and the environment in overburdened communities; 2) empower communities to take action to improve their health and environment; and 3) establish partnerships with local, state, tribal, and federal governments and organizations to achieve healthy and sustainable communities.

After the development of the Plan, questions regarding how it would be implemented in Indian country and for indigenous peoples surfaced, both within and outside the Agency. In addition, there were calls for greater clarity and consistency in how the Agency addresses issues of environmental justice facing tribes and indigenous stakeholders. The National Environmental Justice Advisory Council (NEJAC), an EPA federal advisory committee, called upon the Agency to once again create a subcommittee within the NEJAC to provide advice to the Agency on these matters. The NEJAC’s first Indigenous Peoples Subcommittee (IPS) was created in 1995 and functioned until 2005. During the existence of the IPS, and up to the present time, the NEJAC¹² in 2000, 2004 and 2011, as well as some tribes and other indigenous stakeholders, have encouraged greater coordination and collaboration among the EPA and tribal environmental programs and EPA’s tribal and environmental justice programs to advance environmental and human health protection and environmental justice. In response, in August 2011, the Agency committed to developing a policy to bring greater clarity, and enhance consistency, regarding how EPA would work with federally recognized tribes and indigenous stakeholders to provide for environmental justice in Indian country and in other areas of interest to indigenous peoples. A new NEJAC Indigenous Peoples Work Group was formed in October 2011 to help the NEJAC provide advice and recommendations to the Agency on the development of its policy.

The Agency recognizes the strong connection many tribes and indigenous communities have to the natural environment and their historical role in the protection and sustainability of the environment. The EPA also understands that “throughout their long history... [tribes] have faced moments of profound triumph and tragedy alike,” and “face huge challenges that have been ignored by our Government for too long.”¹³ Many tribes and indigenous stakeholders have

noted that the challenges they face include the degradation of their lands, human health, sacred sites, hunting and fishing areas, as well as other cultural and traditional areas. Progress has been made to rectify some of the causes of the harm and degradation, and the EPA expects this Policy will continue to advance the protection of the environment and human health of tribes and indigenous peoples throughout the United States.

CORE PRINCIPLES

The principles and sub-principles are designed to guide the EPA as it integrates environmental justice into the Agency's work with tribes and indigenous stakeholders.

FEDERALLY RECOGNIZED TRIBAL GOVERNMENTS

1. THE EPA WORKS WITH FEDERALLY RECOGNIZED TRIBES, ON A GOVERNMENT-TO-GOVERNMENT BASIS, TO SUPPORT THE INTEGRATION OF ENVIRONMENTAL JUSTICE INTO TRIBAL ENVIRONMENTAL AND HUMAN HEALTH PROGRAMS.
 - a. The EPA provides advice and recommendations to tribes, when requested, on how they can create and implement environmental justice programs, including procedures designed to ensure fair treatment and meaningful involvement.
 - b. The EPA, through its Indian Environmental General Assistance Program, helps tribes build capacity to establish public participation, community involvement, education, and communication systems to engage community members to understand their environmental and public health concerns, educate the public on human health and environmental protection issues important to the tribe, and be responsive to concerns raised.
 - c. The EPA shares information about the Agency's environmental justice policies, practices and tools with tribes, to support them in developing their environmental programs, including the capacity to conduct their own environmental justice analyses.
 - d. The EPA recognizes tribal governments as the primary parties for setting standards, making environmental policy decisions, and managing programs in Indian country, consistent with the Agency's standards and regulations.¹⁴

THE EPA'S DIRECT IMPLEMENTATION

2. THE EPA INCORPORATES ENVIRONMENTAL JUSTICE PRINCIPLES WHEN DIRECTLY IMPLEMENTING FEDERAL ENVIRONMENTAL LAWS.
 - a. The EPA incorporates environmental justice principles when developing and directly implementing federal environmental and human health programs inside or outside Indian country.
 - b. The EPA uses the Agency's legal authorities, whenever appropriate, to advance its goals of environmental justice in the United States, including in Indian country.¹⁵
 - c. The EPA provides transparency and accountability consistent with applicable laws and policies,¹⁶ and encourages other federal, tribal, state, territorial, and local agencies, indigenous communities, and other environmental justice stakeholders to do the same throughout the various environmental and human health decision-making and implementation processes.

- d. The EPA provides confidentiality, as appropriate and consistent with applicable laws and policies, such as when information on sacred sites and cultural resources are discussed, or fears of retaliation for disclosing violations of environmental or other laws exist. (Where EPA is bringing an enforcement action, there are limitations on the Agency's ability to fully share information due to the sensitivity of prosecutorial judgments and strategies, the confidential nature of negotiations, legal constraints, or the presence of other confidential information.)
- e. The EPA, to the extent practicable and culturally appropriate, integrates Traditional Ecological Knowledge (TEK)¹⁷ into the Agency's environmental science, policy, and decision-making processes to understand and address environmental justice concerns and facilitate program implementation.¹⁸ When incorporating this information (assuming permission by the tribe or indigenous community), EPA will work closely with the tribe to develop culturally appropriate protocols for working with TEK to ensure that sensitive and confidential information is protected, as appropriate and consistent with applicable laws, and that the information is used to improve tribal environmental health¹⁹.

When Working Specifically with Federally Recognized Tribes During Implementation

- f. The EPA works in partnership, when appropriate, with federally recognized tribes when Agency actions, including actions related to environmental justice, may affect tribal interests.²⁰
- g. The EPA encourages tribes to participate in the direct implementation of the Agency's environmental justice program, including the planning and implementation of EPA's public participation activities and review opportunities, including administrative review processes.
- h. The EPA works to listen to, identify, be responsive to, and address the environmental justice concerns of tribes, as sovereigns and co-regulators with the Agency.

When Working Specifically with Indigenous Stakeholders During Implementation

- i. The EPA works to listen to, identify, be responsive to, and address the environmental justice concerns of tribal members, tribal community-based organizations and other indigenous stakeholders, as they pertain to the Agency's authorities and mission.²¹

COMMUNITY ENGAGEMENT AND PARTICIPATION²²

- 3. THE EPA ENGAGES IN OPEN COMMUNICATION WITH INDIGENOUS STAKEHOLDERS AND PROVIDES FOR MEANINGFUL INVOLVEMENT AND FAIR TREATMENT.
 - a. The EPA strives to understand cultural and communication differences of indigenous stakeholders to establish common understandings of, and opportunities to address, environmental and human health issues of concern.
 - b. The EPA, to the extent practicable, identifies key points of contact in indigenous communities to facilitate early and frequent engagement on environmental justice issues, and to enhance EPA's understanding of the unique aspects and nature of the communities.

- c. The EPA prepares, presents, and distributes information to indigenous communities' key points of contact in a manner that is designed to facilitate informed participation in, and understanding of, environmental justice issues, laws and policies, and the decision-making process.
 - d. The EPA works with indigenous communities' key points of contact to clearly and effectively communicate findings, decisions, and actions.
 - e. The EPA uses conflict management and dispute resolution, when appropriate, recognizing tribal or indigenous peoples' practices, to resolve disputes.²³
 - f. The EPA responds to the environmental justice concerns of tribal members, as citizens²⁴ of the United States, as well as the environmental justice concerns of others residing in Indian country, recognizing the need to be responsible to the environmental justice concerns of individual tribal members.
4. THE EPA ASSESSES THE POTENTIAL FOR DISPROPORTIONATELY HIGH AND ADVERSE HUMAN HEALTH OR ENVIRONMENTAL EFFECTS ON TRIBES OR INDIGENOUS COMMUNITIES.
- a. The EPA considers both quantitative and qualitative information about the potential disproportionately high and adverse human health or environmental effects pertaining to, and/or provided by, tribes or indigenous stakeholders.
 - b. The EPA works to understand Traditional Ecological Knowledge and its role in protecting public health and the environment, and to understand community definitions of health and the environment.
5. THE EPA ESTABLISHES EFFECTIVE EXTERNAL COMMUNICATION AND COORDINATION THROUGH PARTNERSHIPS WITH TRIBES AND INDIGENOUS STAKEHOLDERS.
- a. The EPA builds and maintains relationships with tribes and indigenous stakeholders founded on mutual trust and respect.
 - b. The EPA works to identify groups who have expressed an interest in, or may be affected by, or involved in planned EPA activities or actions.
 - c. The EPA encourages and helps facilitate discussions among and between tribes, states, and indigenous stakeholders when environmental justice issues are identified during the implementation of EPA approved environmental programs.

INTERAGENCY COORDINATION

6. THE EPA COORDINATES AND COLLABORATES WITH OTHER FEDERAL AGENCIES TO ADDRESS THE ENVIRONMENTAL JUSTICE CONCERNS OF TRIBES AND INDIGENOUS STAKEHOLDERS.
- a. The EPA works with other federal agencies to address federally recognized tribal government environmental justice issues, in ways that support the government-to-government relationship with tribes and tribal sovereignty, consistent with the 1983 Federal Indian Policy.²⁵
 - b. The EPA seeks to appropriately collaborate and cooperate with other federal agencies to address the environmental justice issues of indigenous stakeholders in Indian country and throughout the United States.

- c. The EPA leverages resources in order to better provide access to information, communication, and collaboration to address the tribal and indigenous stakeholders' issues of environmental justice.

POLICY IMPLEMENTATION

7. THE EPA INCORPORATES THE CORE PRINCIPLES OF THIS POLICY INTO ONGOING OPERATIONS.

- a. The EPA intends to implement this Policy using available funding, and using, to the greatest extent possible, existing Agency structures and business processes.
- b. The EPA obtains training to enhance the understanding of the roles of the Agency, tribes, and indigenous stakeholders, including tribal and indigenous cultural practices, customs, governances, and histories.
- c. The EPA intends to develop an implementation plan for this Policy to clarify the roles and responsibilities of the Agency's offices, regions and programs, and to ensure consistent implementation of the Policy's principles.

Disclaimer

This document identifies internal Agency policies and procedures for EPA employees in coordinating Agency activities related to environmental justice issues in Indian country and those affecting tribes and indigenous stakeholders. This document is not a rule or regulation and it may not apply to a particular situation based upon the circumstances. This document does not change or substitute for any law, regulation, or any other legally binding requirement and is not legally enforceable. As indicated by the use of non-mandatory language, this Policy does not create any judicially enforceable rights or obligations substantive or procedural in any person.

Endnotes

¹ The United States has a unique legal and political relationship with federally recognized Indian tribes, as provided by the Constitution of the United States, treaties, court decisions and Federal statutes. The Department of the Interior's current published list of federally recognized tribes is available at <https://www.federalregister.gov/articles/2012/08/10/2012-19588/indian-entities-recognized-and-eligible-to-receive-services-from-the-bureau-of-indian-affairs> (Aug. 10, 2012).

² For the purposes of this Policy, the term "*indigenous stakeholders*" or "*indigenous communities*" includes state-recognized tribes, individual members of federally recognized tribes, including those living outside Indian country, individual members of state-recognized tribes, individual members of non-recognized tribes, indigenous community-based organizations, tribal colleges, Native Hawaiians, native Pacific Islanders, including Chamorros, Carolinians, and Samoans, and other indigenous stakeholders.

³ Indian country is defined at 18 U.S.C. § 1151 to mean: (a) all land within the limits of any Indian reservation under the jurisdiction of the United States Government, notwithstanding the issuance of any patent, and, including rights-of-way running through the reservation; (b) all dependent Indian communities within the borders of the United States whether within the original or subsequently acquired territory thereof, and whether within or without the limits of a state; and (c) all Indian allotments, the Indian titles to which have not been extinguished, including rights-of-way running through the same. As used in this document Indian country includes, as appropriate to the circumstance or activity being described, Indian country as defined at 18 U.S.C. § 1151 and/or other tribal areas, including Alaska Native Villages, where federally recognized tribes have rights or interests.

⁴ On February 11, 1994, President William Clinton issued Executive Order 12898, *Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations*, <http://www.epa.gov/lawsregs/laws/eo12898.html>.

⁵ Plan EJ 2014 is the EPA's roadmap for integrating environmental justice into the Agency's programs, policies, and activities. <http://www.epa.gov/environmentaljustice/plan-ej/>.

⁶ The EPA Indian Policy, issued on November 8, 1984, can be found at: <http://www.epa.gov/tp/pdf/indian-policy-84.pdf>.

⁷ The EPA Policy on Consultation and Coordination with Indian Tribes, issued May 4, 2011, can be found at: <http://www.epa.gov/tp/pdf/cons-and-coord-with-indian-tribes-policy.pdf>.

⁸ President Barack Obama announced U.S. support for the United Nations Declaration on the Rights of Indigenous Peoples on December 16, 2010, during the President's meeting with tribal leaders. The Declaration is accessible at http://www.un.org/esa/socdev/unpfii/documents/DRIPS_en.pdf. "[T]he United States intends to improve our engagement with other indigenous individuals and groups. The United States will also continue to implement the many U.S. laws that require the agreement of federally recognized tribes or indigenous groups before certain actions can be taken..." *Announcement of U.S. Support for the United Nations Declaration on the Rights of Indigenous Peoples - Initiatives to Promote the Government-to-Government Relationship & Improve the Lives of Indigenous Peoples*, page 5, December 16, 2010, U.S. Department of State. <http://www.state.gov/documents/organization/184099.pdf>

⁹ Executive Order 12898, Section 6-606, *Native American Programs*.

¹⁰ *Plan EJ 2014* (Sept. 2011) at p. 3. *Fair Treatment* means that no group of people should bear a disproportionate burden of environmental harms and risks, including those resulting from the negative environmental consequences of industrial, governmental, and commercial operations or programs & policies. *Meaningful Involvement* means that: 1) potentially affected community members have an appropriate opportunity to participate in decisions about a proposed activity that will affect their environment and/or health; 2) the public's contribution can influence the regulatory agency's decision; 3) the concerns of all participants involved will be considered in the decision-making process; and 4) the decision-makers seek out and facilitate the involvement of those potentially affected.

¹¹ The EPA's Plan EJ 2014 can be found at: <http://www.epa.gov/environmentaljustice/resources/policy/plan-ej-2014/plan-ej-2011-09.pdf>

¹² The National Environmental Justice Advisory Council (NEJAC) provided advice and recommendation to the EPA on two core principles of environmental justice, meaningful involvement and fair treatment, as they pertain to tribes and indigenous peoples, in two separate reports prepared by the NEJAC's Indigenous Peoples Subcommittee, *Meaningful Involvement and Fair Treatment by Tribal Environmental Regulatory Programs*, Pages 27-29, November 2004, and *Guide on Consultation and Collaboration with Indian Tribal Governments and the Public Participation of Indigenous Groups and Tribal Members in Environmental Decision Making*, cover letter to the Administrator and Pages 21-24, November 2000.

¹³ Excerpt from President Barack Obama's Proclamation for Native American Heritage Month, 2009.

¹⁴ See EPA Indian Policy

¹⁵ Plan EJ 2014: Legal Tools provides an overview of a number of discretionary legal authorities that are or may be available to EPA to address environmental justice consideration under federal statutes and programs. See <http://www.epa.gov/compliance/ej/resources/policy/plan-ej-2014/ej-legal-tools.pdf>

¹⁶ See President Barack Obama's Memorandum on Transparency and Open Government, January 21, 2009. http://www.whitehouse.gov/the_press_office/TransparencyandOpenGovernment/

¹⁷ The Director General of United Nations Educational, Scientific and Cultural Organization (Mayor, 1994) defines traditional knowledge as follows: *The indigenous people of the world possess an immense knowledge of their environments, based on centuries of living close to nature. Living in and from the richness and variety of complex ecosystems, they have an understanding of the properties of plants and animals, the functioning of ecosystems and the techniques for using and managing them that is particular and often detailed. In rural communities in developing countries, locally occurring species are relied on for many - sometimes all - foods, medicines, fuel, building materials and other products. Equally, peoples knowledge and perceptions of the environment, and their relationships with it, are often important elements of cultural identity.*

¹⁸ EPA's approach to Science in Indian country is available at <http://epa.gov/osp/tribes/tribes.htm>.

¹⁹ An example of protocol regarding the gathering and use of TEK can be found at the Alaska Native Science Commission's website: <http://nativescience.org/issues/tk.htm>

²⁰ See EPA Consultation Policy.

²¹ See EPA Consultation Policy, Section VI, Guiding Principles, Page 4, *EPA recognizes the need to be responsive to the environmental justice concerns of non-federally recognized tribes, individual tribal members, tribal community-based/grassroots organizations and other indigenous stakeholders*

²² Public Involvement Policy of the U.S. Environmental Protection Agency, May 2003, *“The fundamental premise of this Policy is that EPA should continue to provide for meaningful public involvement in all its programs, and consistently look for new ways to enhance public input,”* page 1, Introduction.

<http://www.epa.gov/stakeholders/policy2003/index.htm>

²³ EPA strongly supports the use of alternative dispute resolution (ADR) to deal with disputes and potential conflicts. EPA uses the definition of ADR in the Administrative Dispute Resolution Act of 1996,

http://www.epa.gov/adr/cprc_adratepa.html

²⁴ 1924 Indian Citizenship Act provides, *“all non citizen Indians born within the territorial limits of the United States be, and they are hereby, declared to be citizens of the United States...”* United States Code at 8 U.S.C. § 1401(b).

²⁵ On January 24, 1983, President Ronald Reagan issued the “Federal Indian Policy” stressing: (1) that the Federal Government will pursue the principle of Indian “self-government” and (2) that it will work directly with Tribal Governments on a “government-to-government” basis. <http://www.epa.gov/tp/pdf/president-reagan83.pdf>.